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No. 03-1359

In the Supreme Court of the United States

JOEY L. MITCHELL, PETITIONER

v.

GLENN CHAPMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Family Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, imposes individual liability on supervisory employees of a public agency.

2. Whether dismissal of a plaintiff's lawsuit for failure to consult with an agency counselor within 45 days of the alleged discrimination is "on the merits" for claim preclusion purposes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 343 F.3d 811. The opinion of the district court (Pet. App. 39a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2003. A petition for rehearing was denied on December 23, 2003 (Pet. App. 38a). The petition for a writ of certiorari was filed on March 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Joey L. Mitchell, an employee of the United States Postal Service, brought this action against the Postal Service, the Postmaster General, and three individual postal employees (respondents). Petitioner claimed that the respondents' refusal to give him a mail carrier position in which he could use a waist harness violated, *inter alia*, the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.*. The district court dismissed the action, and the court of appeals affirmed.

1. In July 1995, petitioner was hired as a mail carrier at the Paris, Kentucky, post office. Pet. App. 2a. Petitioner's treating physician certified that petitioner's chronic neck pain was a "serious illness" under the FMLA that might require periodic absences from work. *Id.* at 2a-3a.

In February 1997, petitioner requested a transfer to a clerk position. Pet. App. 3a. In May 1997, petitioner did not show up for work. *Ibid.* When he returned the following day, his supervisor, respondent Glenn Chapman, told petitioner that the unscheduled absence might hurt his chances of receiving a transfer. *Ibid.* Petitioner responded that his absence was protected leave under the FMLA, and that he would have to file for permanent disability if he were forced to continue working as a mail carrier. *Ibid.*. Chapman alerted respondent Richard Derrickson, the postmaster of the Paris post office, of the possibility that petitioner's health condition might prevent him from carrying mail safely, and Derrickson decided that petitioner should receive a medical fitness-for-duty examination. *Id.* at 3a-4a. In the interim, petitioner was relieved of his mail carrier duties. *Id.* at 4a.

Several days later, petitioner's treating physician "medically cleared" him to return to his position as a mail carrier, but also stated that he should be considered for a "less physically strenuous position" so as not to "exacerbate his head and neck pain." Pet. App. 4a (citation omitted). A physician under contract with the Postal Service examined petitioner and concluded that petitioner should not carry mail with a satchel based on petitioner's representations that it "increase[d]" or "aggravate[d]" his neck pain. *Id.* at 4a-5a. A neurosurgeon who examined petitioner nonetheless released him to "work duty without restrictions." *Id.* at 5a. Respondent Naewana Nickles, an occupational health nurse administrator with the Postal Service, requested a follow-up report. In response, the neurosurgeon stated that petitioner should not continue to carry mail with a satchel if doing so caused petitioner neck pain. *Id.* at 5a-6a. Because the only available mail carrier positions required the use of a satchel, Postmaster Derrickson did not return petitioner to mail carrier duties. *Id.* at 6a.

In August 1997, petitioner again requested transfer to a clerk position. Pet. App. 6a. Postmaster Derrickson approved that request, which became effective on August 30, 1997. *Ibid.* Petitioner claims that he attempted to withdraw his transfer request after learning that he was at low risk of injury if he carried mail with a waist harness, but that Derrickson denied the request. *Ibid.* According to Derrickson, however, petitioner never withdrew his transfer request. *Ibid.*

2. On October 30, 1997, petitioner contacted an Equal Employment Opportunity counselor complaining that the refusal to permit him to carry mail with a waist harness constituted disability discrimination. Pet. App. 7a. Petitioner subsequently filed a formal complaint of

discrimination. *Ibid.* Under the applicable federal regulations, a person aggrieved by alleged discrimination based on disability must consult with an EEO counselor within 45 days of the alleged discriminatory conduct. 29 C.F.R. 1614.105. Because petitioner failed to satisfy the 45-day requirement, the Postal Service dismissed his complaint. Pet. App. 8a.

On November 17, 1998, petitioner filed suit in federal district court, alleging that the refusal to permit him to carry mail using a waist harness violated his rights under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq*, and the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* Pet. App. 8a. The district court dismissed the action on the ground that petitioner had failed to consult with an EEO counselor within 45 days of the alleged discriminatory conduct. *Ibid.*

Petitioner filed a second lawsuit, in which he once again alleged that the refusal to permit him to work as a mail carrier with a waist harness violated the Rehabilitation Act and the ADA. Pet. App. 9a. Petitioner added several new claims, including a claim under the FMLA. *Ibid.* The district court granted summary judgment in favor of the respondents. *Id.* at 9a-10a. As relevant here, the court held that the claims against the Postal Service and the respondents in their official capacities were barred by claim preclusion, and that the FMLA does not impose individual liability on supervisory employees of public agencies. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-37a. The court held that claim preclusion barred the claims against the Postal Service and the postal officials in their official capacities. *Id.* at 11a-21a. The court reasoned that claim preclusion applies when a dismissal is "on the merits" and that a dismissal for failure to consult with~~in the~~ 45-day period, like a dismissal on

statute of limitations grounds, is a judgment "on the merits." *Id.* at 11a-16a.

The court next held that petitioner's individual capacity claims failed as a matter of law because the FMLA does not authorize individual capacity suits against supervisory employees of public agencies. Pet. App. 23a-37a. The court noted that the FMLA creates a private right of action entitling "eligible employees" to seek monetary and injunctive relief "against any employer (including a public agency)," 29 U.S.C. 2615(a)(1), 2617(a)(2), and that it defines "employer" as follows:

> (4) Employer
>
> (A) In general
>
> The term "employer"—
>
> (i) means any person engaged in commerce or in any industry * * * affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;
>
> (ii) includes—
>
> (I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
>
> (II) any successor in interest of an employer;
>
> (iii) includes any "public agency", as defined in section 203(x) of this title; and

> (iv) includes the General Accounting Office and the Library of Congress.
>
> (B) Public agency.
>
> For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

29 U.S.C. 2611(4). See Pet. App. 30a-31a. The court concluded that three features of the statute demonstrate that the FMLA does not impose individual liability on supervisory employees of a public agency. *Id.* at 31a.

First, the statutory definition of employer "explicitly separates the individual liability provision and public agency provision into two distinct clauses." Pet. App. 30a. Specifically, while subsection (4)(A) uses an "em dash" to introduce related definitions of employer, and subsection (4)(A)(ii) uses an "em dash" to establish a relationship between the individual liability provision and the provision addressing successors in interest, the FMLA lacks punctuation demonstrating a relationship between the individual liability provision and the public agency provision. *Id.* at 31a-32a.

Second, the court concluded that "commingling of clauses (i)-(iv) into the term 'employer' yields an interpretation that renders other provisions of the statute superfluous, as well as creates several oddities." Pet. App. 32a. In particular, the court concluded that such commingling would: (1) render superfluous the provision specifying that a public agency shall be considered to be engaged in commerce (*id.* at 33a); (2) suggest that a public agency would have to employ more than 50 employees to fall within the statute, although it is "well-settled" that no such requirement

exists (*ibid.*); and (3) suggest that Congress intended to extend "specific protection to employees of the GAO and the Library of Congress from future successors in interest," which is so unlikely as to be "an exercise in absurdity" (*id.* at 34a).

Third, the court noted that, while the FMLA borrowed other provisions from the FLSA, it modified the FLSA definition of employer by disconnecting the private employer definition from the personal liability definition. Pet. App. 35a. That modification, the court concluded, is best viewed as correcting the ambiguity in the FMLA regarding personal liability so as to make clear that supervisory employees of public employers are not subject to personal liability. *Ibid.*

ARGUMENT

1. Petitioner contends that review is warranted to resolve a conflict in the circuits on the question whether the FMLA imposes individual liability on supervisory employees of public employers. Pet. 4-8. Review of that question is not warranted for three reasons.

First, the court of appeals in this case is the first court to conduct a thorough textual analysis to determine whether the FMLA imposes individual liability on supervisory employees of public employers. Only two other courts of appeals have addressed the issue: Both have given only limited consideration to the issue, and neither has addressed the textual points made by the court below.

Like the court of appeals in this case, the Eleventh Circuit has held that FMLA does not impose individual liability on supervisory employees of public agencies. *Wascura* v. *Carver*, 169 F.3d 683, 686-687 (1999). It did so, however, based entirely on an earlier Eleventh Circuit decision holding that a public official sued in his

individual capacity is not an employer subject to liability under the Fair Labor Standards Act. *Ibid.* The Eighth Circuit held that the FMLA imposes individual liability on supervisory employees of public employers, but its entire reasoning consists of the statements that the FMLA's definition of employer "plainly includes persons other than the employer itself," and "[w]e see no reason to distinguish employers in the public sector from those in the private sector." *Darby* v. *Bratch*, 287 F.3d 673, 681 (2002).

Because only two circuits besides the court below have addressed the issue, and because those two circuits have given the issue only limited consideration, the issue would benefit from further ventilation in the circuits. That process might result in the elimination of the conflict that currently exists. But even if it does not, future opinions are likely to take into account the extensive textual analysis of the court below in a way that helps to promote a more well-developed understanding of the issue. Review of the issue at this juncture would be premature.

Second, resolution of the question whether the FMLA imposes individual liability on supervisory employees of public agencies does not have sufficient practical importance to warrant the Court's review. Plaintiffs in FMLA actions involving public employers can obtain all available relief by suing their employers. Indeed, most of the FMLA's remedies are available *only* from the employer. See 29 U.S.C. 2617(a)(1); see also 29 U.S.C. 2614(c)(1) (requiring "employer" to maintain health benefits for employees on leave); 29 U.S.C. 2616(b) (requiring employer to keep and preserve records of FMLA compliance); 29 U.S.C. 2619(a) (requiring employer to post notices of employees' FMLA rights). The question whether petitioner could sue his

supervisors in their individual capacities assumed significance here for reasons peculiar to this case: Petitioner failed to satisfy the 45-day consultation period and therefore could not sue his employer directly; and the courts below held that the dismissal of the action against the Postal Service on that ground did not bar a subsequent suit against individual supervisors in their individual capacities. Pet. App. 17a-20a. Because FMLA plaintiffs who have meritorious claims generally can obtain complete relief from their employers, the question whether the FMLA imposes individual liability on supervisory employees of public employers is not of sufficient recurring importance to warrant the Court's review.

Finally, resolution of the question petitioner seeks to present would be complicated by the existence of an antecedent question. That antecedent question is whether the FMLA authorizes *any* individual capacity suits. The court below held that the FMLA does authorize individual capacity suits against supervisory employees of private employers, Pet. App. 27a-28a, and that is consistent with the view of the Secretary of Labor. 29 C.F.R. 825.104(a). Relying on an analogy to Title VII, however, some courts have held that the provision specifying that an employer includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer" (29 U.S.C. 2611(4)(A)(ii)(I)) does not authorize individual capacity suits, but instead establishes a principle of vicarious liability. Pet. App. 28a n.18. Because the United States generally has a responsibility to defend regulations issued by the Secretary of Labor, that antecedent question might not receive an adversary presentation in this case. That circumstance makes this case an inappropriate vehicle for resolving the antece-

dent question. And because resolution of the antecedent question is necessary for an intelligent resolution of the question petitioner seeks to present, this case is not an appropriate vehicle for resolving that question either.

2. Petitioner contends that a dismissal of an action based on a litigant's failure to meet with an Equal Employment Opportunity counselor within the mandatory time period is not "on the merits" for claim preclusion purposes. Pet. 8-13. That contention lacks merit and does not warrant review.

As the court of appeals recognized, the requirement that a litigant consult with an agency counselor within 45 days of the alleged discrimination is functionally the same as a statute of limitations. Pet. App. 14a. In both cases, compliance with the time period is a condition precedent to suit, and in both cases, once the time period expires, the plaintiff is permanently barred from bringing suit. *Ibid.* This Court's decision in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995), makes clear that a federal court's dismissal of a federal action on statute of limitations grounds is "on the merits" for claim preclusion purposes. See 18 *Moore's Federal Practice* § 131.30[3][g][i], at 131-111 (3d ed. 2004); 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4441, at 213-214 (2d ed. 2002). Because the dismissal at issue here has the same characteristics as a dismissal on statute of limitations grounds, it is also "on the merits" for claim preclusion purposes. Every court that has addressed the issue has reached that conclusion. See, *e.g.*, *Nwosun* v. *General Mills Rest., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997), cert. denied, 523 U.S. 1064 (1998); *Kratville* v. *Runyon*, 90 F.3d 195, 198 (7th Cir. 1996); *Nilson* v. *City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983) (en banc).

Petitioner relies on a handful of cases involving "condition precedents" to argue that dismissal for failure to satisfy a precondition to bringing suit does not preclude a subsequent lawsuit. Pet. 9-10. In each of the cases the petitioner cites, however, the condition precedent was still capable of being satisfied when the case was dismissed. See, *e.g.*, *Costello* v. *United States*, 365 U.S. 265, 268 (1961) (case dismissed for failure to file affidavit of good cause with complaint); *Truvillion* v. *King's Daughters Hosp.*, 614 F.2d 520, 524-525 (5th Cir. 1980) (case dismissed because of EEOC's failure to give prior notice to employer); see also *Criales* v. *American Airlines, Inc.*, 105 F.3d 93, 97 (2d Cir.) (res judicata does not apply where suit is dismissed for failure to comply with condition precedent and plaintiff "remained capable of complying with that precondition" following dismissal), cert. denied, 522 U.S. 906 (1997). Here, in contrast, dismissal of the first action was "the 'death knell' of the litigation" because petitioner was permanently foreclosed from meeting the long-expired deadline for seeking administrative relief. Pet. App. 15a (quoting *Wilkins* v. *Jakeway*, 183 F.3d 528, 534 (6th Cir. 1999)). The cases on which petitioner relies are therefore inapposite here.

Petitioner ultimately appears to argue that a court must consider the underlying facts of the claim for claim preclusion to apply. This Court, however, has squarely rejected that view. See *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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